situated therein. If the enterprise carries on business as aforesaid, tax may be imposed in that other Contracting State on the income or profits of the enterprise but only on so much thereof as is attributable to that permanent establishment."

Referring to this Clause, his Lordship went on to say that since the Article XI definition of "royalties" does not apply, then any income of EIL is taxable only in U.K. since it does not carry on business in Malaysia through a permanent establishment here. Since the provision of the Relief Order is unambiguous and applies in this case, he therefore did not consider it appropriate to apply the presumptive provisions of section 15(b) of the Act, and in consequence there was no legal basis for the DGIR to charge income tax under section 4 of the Act.

Counsel for the appellant (Revenue) aver that the only point in dispute is whether, having found that the sum in dispute is royalty within the meaning of section 2 of the Act, the learned Judge could then hold that because the definition of "royalties" in Article XI did not apply, Clause 1 of Article VI would then become applicable and the management fees paid to EIL would therefore be income taxable in the United Kingdom only.

It appears to us that the learned Judge never intended it to be understood that he had found the managment fees to be royalty under section 2 of the Act. What he obviously means is that whilst the parties agree that the fee does appear to come under the definition of "royalty" under that section, it does not come within the definition of that term in the Relief Order, and that because under section 132(1) of the Act in the event of conflict the provisions of the Relief Order should prevail, the fees should be treated as income or profit and not as royalty.

The provision is not peculiar to our tax law. Counsel for the respondent drew our attention to a similar provision in the United Kingdom Income Tax Act, 1918 where in the event of any inconsistency between the provision of the Act on the one hand and a Double Taxation Relief Agreement on the other, the Agreement must prevail over the Act – see *Ostime (H.M. Inspector of Taxes)* v. *Australian Mutual Provident Society*[1].

We were also referred to the decision of this court in *Director-General of Inland Revenue* v. *Phaltan Sugar Works Ltd.*[2] which learned counsel for Revenue submits is on all fours with the present appeal and is therefore applicable to the present appeal.

The great difference between these two cases is that in *Phaltan Sugar*, there is no conflict between the definition of "royalty" under the Act and that in the Indian Order, though the definition in the Act is wider in its scope, so that section 132(1) of the Act does not operate.

The *Phaltan Sugar* decision does not therefore assist Revenue.

We would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

KAM GIN PAIK & ORS. v. PEMUNGUT HASIL TANAH DAERAH BARAT DAYA, PULAU PINANG

[O.C.J. (Raja Abdul Aziz Addruse J. C.) January 23 & 24, February 28, April 8 & November 9, 1981]

[Penang – Originating Motion No. 16 of 1980]

Administrative Law – Application for certiorari – Land Acquisition – Award referred to High Court – Whether bar to proceedings for certiorari – Land Acquisition Act, 1960, ss. 38(5) & 68 – Federal Constitution, Art 13.

In this case the applicants applied for an order of certiorari to quash the decision of the Collector of Land Revenue, Barat Daya, Pulau Pinang for the acquisition of certain land registered in the name of the applicants. One of the grounds raised was that the award ought to be quashed by reason of failure on the part of the Collector to observe the rules of natural justice when conducting his enquiry. A preliminary objection was raised that, as the respondent's award had been referred to the High Court, the proceedings should be stayed until the reference had been disposed of.

Held: (1) the applicants will not be able to obtain the remedy they seek by these proceedings in the reference under section 38(5) of the Land Acquisition Act, 1960. For that reason the application of the respondents to stay the proceedings should be dismissed;

(2) section 68 of the Land Acquisition Act, 1960 which says that no order or award of the Collector made under the Act should be set aside, must be read subject to Article 13 of the Federal Constitution which provides that no person shall be deprived of property save in accordance with law and even then subject to the payment of adequate

compensation. Section 68 only applies to decisions and awards which have been properly made by the Collector.

Cases referred to:

(1) *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] A.C. 663, 695.
(2) *Reg.* v. *Surrey Justices* (1870) L.R. 5 Q.B. 466.
(3) *Reg.* v. *Manchester Legal Aid Committee* [1952] 2 Q.B. 413.

CIVIL SUIT.

Karpal Singh (*Balwant Singh Purba* with him) for the applicant.

Lim Beng Choon, Senior Federal Counsel (*Sabaruddin bin Haji Othman*, State Legal Adviser, Penang with him) for the respondent.

Cur. Adv. Vult.

Raja Abdul Aziz Addruse J.C.: On an application made *ex parte* on August 16, 1980, leave was given by this court to the Applicants to apply for an Order of Certiorari to remove into this court and to quash the decision and award of compensation made by the Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang, on February 7, 1980, for the acquisition of certain lands registered in the name of the Applicants. Pursuant to the leave given, the Applicants applied for the Order of Certiorari by Notice of Motion dated October 27, 1980, which was served on the Respondent, the Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang, on January 8, 1981. When the Motion came to be heard on January 23, 1981, Senior Federal Counsel appearing for the Respondent applied for an adjournment on the ground that through an inadvertence, the Respondent did not instruct him until the day before the hearing. It was, however agreed by Counsel for the Applicants and the Senior Federal Counsel that the former would make his submission on the Motion on January 24, 1981, and that the hearing be thereafter adjourned to another date when the Senior Federal Counsel would make his submission in reply. I, accordingly, heard Mr. Karpal Singh's submission on January 24, 1981, and thereafter adjourned the matter to February 28, 1981.

When the matter came up for hearing on February 28, 1981, Mr. Lim Beng Choon, Senior Federal Counsel, appearing for the Respondent, raised a preliminary issue and applied for these proceedings to be stayed on the ground that the Respondent's award now sought to be quashed had been referred by the Applicants to the High Court under section 38(5) of the Land Acquisition Act, 1960. It was argued that as this court, when considering the reference, would be dealing with the same points involved in this Motion, these proceedings should be stayed until the reference had been disposed of.

For the purpose of determining whether or not the application to stay should be granted, it is necessary that I consider what powers the High Court has when hearing the reference made under section 38(5) of the Act, in particular, whether the High Court can, at the hearing of the reference, deal with the several issues raised in the present proceedings, bearing in mind that the Court ought not to refuse to grant an Order of Certiorari, unless it is clearly satisfied that there are other remedies available to the Applicants which are more appropriate. The law on this is referred to in *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*[1] where, Lord Denning, after stating the general rule that the issue of Certiorari is a matter of discretion for the High Court, said –

> "..... a subsidiary rule has been laid down to the effect that where the Applicant is a party grieved who has no other remedy, the court will grant [the Order of Certiorari] *ex debito justitiae:* See *Reg.* v. *Surrey Justices*[2]; *Reg.* v. *Manchester Legal Aid Committee*[3]."

The power conferred on the High Court by section 38(5) of the Land Acquisition Act, 1960, does not, in my view, permit it to go into the issues raised in these proceedings, namely:–

(a) whether the Collector's award ought to be quashed by reason of failure on the part of the Collector to observe the rules of natural justice when conducting his enquiry; and

(b) the other issues raised by the Applicants in these proceedings which this court will have to consider.

I am, therefore, of the view that the Applicants will not be able to obtain the remedy they seek by these proceedings, in the reference under section 38(5) of the Act. For that reason, the application of the Respondents to stay these proceedings should be dismissed, and I accordingly dismissed it.

In coming to this conclusion, I have not overlooked the provisions of section 68 of the Act, to which my attention was drawn by the learned Senior Federal Counsel. That section says that no

order or award of the Collector made under the Act should be set aside. In construing that section and indeed, the Act itself, regard must be had to Article 13 of the Federal Constitution which provides that no person shall be deprived of property save in accordance with law and, even then, subject to the payment of adequate compensation. In my view section 68 of the Act must be read in conjunction with the right guaranteed to the individual by the said Article 13. It is inconceivable that Parliament, in promulgating the Act, had intended to confer upon the Collector a power so absolute as to exclude altogether the supervisory power of the High Court in relation to decisions and awards improperly made under the Act. If section 68 were to be given a literal interpretation, the fundamental right guaranteed by Article 13 would be rendered nugatory. In my view, section 68 applies only to decisions and awards which have been properly made by the Collector.

Order accordingly.

Solicitors: *Balwant Singh & Co.*

SABDIN GHANI v. MOHAMED SAIDI LAMPOH & 25 OTHER ELECTION PETITIONS

[O.C.J. (Seah J.) August 24 & 25; November 9, 1981]

[Kota Kinabalu – Election Petitions Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 & 26 of 1981]

Election Law – Petitions – Motion to strike out – Meaning of "election" – Date of election – Effect of incorrect date – Misdescription and not a nullity – Security for election – "Charge" to be distinguished from "particulars of charge" – Security only for "charges" – Election Offences Act 1954 (Revised 1969), ss. 8, 9, 10, 32 & 34 – Election Petition Rules 1954, rr. 3, 4(1)(b), 12(1) & (2) & 15.

Election Law – Notice – Service of – Directory rule and not mandatory – Publication in national English newspaper sufficient – Election Petition Rules 1954, r. 15.

Election Law – "Rules of Court" means High Court Rules in operation at time of filing of election petitions – Election Offences Act 1964 (Revised 1969), s. 42(1).

This case concerned 26 election petitions which challenged the elections of 26 members of the Sabah Legislative Assembly from various constituencies of the State of Sabah following the publication of the results of the Sabah State Election held in the month of March 1981 in the Gazette on April 23, 1981. The petitioners alleged that the 27 respondents herein were personally or by their agents guilty of corrupt practices of aiding, abetting or procuring the commission of the offences of bribery, treating and undue influence before, during and after the said election contrary to the provisions of sections 8, 9, 10, and 32(a), (b) and (c) of the Election Offences Act 1954 (Revised 1969). The petitioners prayed for a determination that all the respondents herein were not elected or returned and that the said elections be declared void. Each of the petitioners deposited the sum of $3,000 as security and notices of the presentation of the election petitions appeared in *The New Straits Times* on May 28, 1981. The said notices further provided that a true copy of the said election petitions may be obtained by the said respondents on application at the Office of the Registrar of the High Court at Kota Kinabalu, Sabah.

The respondents sought to have the petitioners struck out on the grounds, *inter alia*, that the petitioners have failed to comply with the provisions of Rules 3, 4(1)(b), 12(1) & (2) and 15 of the Election Petition Rules 1954 and section 34 of the Election Offences Act 1954 (Revised 1969).

Following the filing of the 26 Notices of Motions, the petitioners in Election Petitions Nos. 1, 3, 6 and 26 of 1981 had applied for leave to withdraw. Election Petition No. 7 of 1981 was struck out on the ground that the petitioner therein had no *locus standi*.

Held, dismissing the respondents' Notices of Motions:

(1) although the object of the statute by which the election Tribunal is created is to prevent corrupt and illegal practices, still the Tribunal is a judicial, and not an inquisitorial one. It is a court to hear and determine according to law, and not a commission armed with powers to inquire into and suppress corruption;

(2) the word "election" used in Rule 4 of the Election Petition Rules 1954 should be given a narrow sense to mean the date when the Returning Officer has duly declared a candidate elected after the votes have been counted following a poll;

(3) in view of the wording of Rule 4(1)(b) and Rule 4(4) of the Election Petition Rules 1954, it is not mandatory to state the exact date of the election in the election petition. *A fortiori*, if an incorrect date or dates have been given or stated by the petitioners in the election petitions, this would not vitiate the proceedings for the wrong date or dates could always be amended without causing any injustice to the respondents;

(4) in Election Petitions Nos. 22/81 and 23/81, if the petitioners have not included the date therein, this misdescription does not render the proceedings a nullity since this may be amended at any time without prejudice to the respondents therein named;

(5) in this case, the general allegations of corrupt practices of aiding, abetting or procuring the commission of the offence of bribery, treating and undue influence are sufficient compliance with the law;

(6) a "charge" is to be distinguished from "particulars of a charge" and for the purpose of construing Rule 12(2) of the Election Petition Rules, "particulars of a charge" is not subject to the said Rule 12(2) and that security need not be paid in respect of them but that security is only to be paid "for charges";

(7) an allegation can only form a charge under the said